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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1946**

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# No. 276

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GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. MOTOR TRANSPORTATION CO., ET AL.,

*Appellants,*

*vs.*

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS

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## STATEMENT AS TO JURISDICTION

(Filed May 21, 1946)

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In compliance with Rule 12 of the Supreme Court of the United States, as amended, the appellants respectfully submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause:

A. The statutory jurisdiction of the Supreme Court to review by direct appeal the final decree complained of is

conferred by Sec. 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, par. (4); U. S. C. Title 28, Sec. 345);

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219; U. S. C., Title 28, Secs. 45 and 47a, Supp. III);

B. The statute of the United States the construction of which is involved herein, is the Act of August 9, 1935, c. 498, 49 Stat. 544; as amended Sept. 18, 1940, c. 722, sec. 7, 54 Stat. 905, C. 722, sec. 18, 54 Stat. 920, known as the Interstate Commerce Act, Part II, as amended, and provides for the regulation of interstate motor carriers by the Interstate Commerce Commission. The pertinent sections of the Act read as follows:—

Section 5 (2) (a) (i) "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise."

Section 203 (a) (14) "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation,

whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transporation shall continue to be considered to be and shall be regulated as transportation subject to part I." (as amended by Public Acts No. 785, 76th Congress, sec. 18 (a), approved Sept. 18, 1940.)

Sec. 212 (a) "Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit , or license: Provided, however, That no such certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, that the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206 (a) or temporary authority under section 210a, may be

suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211 (c), 217 (a), or 218 (a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder." (as amended by Public Acts No. 785, 76th Congress, sec. 21 (c), approved Sept. 18, 1940.)

C. The decree sought to be reviewed was entered on March 29, 1946, and the petition for appeal was presented to the District Court on May 21, 1946.

D. This is an appeal from a final decree of a district court of three judges (28 U. S. C. A. sec. 47) which dismissed a complaint against the United States of America and Interstate Commerce Commission to set aside an order of the Commission dated November 1, 1944 in a proceeding entitled *Beacon Fast Freight Co., Inc.,—Purchase—Clarence L. Hardy, docket No. MC-F-2405,* wherein an application under Section 5(2)(a) of the Interstate Commerce Act, as amended, to purchase the operating rights of Clarence L. Hardy was granted by the Commission.

The Complaint, as filed in the district court, alleged in substance (1) that the vendor of a Certificate of Public Convenience and Necessity had wilfully abandoned his motor common carrier operations, sold his motor vehicle equipment, closed his terminal, and discharged all his employees, and, after a period of sixteen (16) months, negotiated a sale of his Certificate to the vendee; and (2) that, for the purpose of transacting a sale of this Certificate, the vendor was not a "carrier" within the meaning, purpose and policy of the Interstate Commerce Act, as amended, especially under Sections 5 (2) (a) and 203 (a) (14), as amended. Hence, the granting by the Commission of the application to purchase the operating rights of this vendor was unlawful as being beyond its statutory powers.

The Report of the Commission, by Division 4, on which the order was based, found that since the vendor had an outstanding unrevoked certificate issued by the Commission, its decision was controlled by the decision laid down, with strong dissent in *Quaker City Bus Co.—Purchase—Blackhawk Line, Inc.*, 38 M. C. C. 603, 607, namely,

> "Possession of a certificate, in and of itself, and without the performance of any transportation, constitutes the holder thereof, a 'motor carrier subject to Part II', and that a sale of the certificate presents a matter subject to the jurisdiction of the Commission under Section 5 (2) (a) of the Act, notwithstanding the abandonment of motor carrier operations."

Final hearing was held by the District Court of three judges, one of whom was a Circuit Judge. A transcript of all the evidence received before the Interstate Commerce Commission, duly certified by the Secretary of the Commission, was received in evidence before said Court. Thereafter, on March 29, 1946, the Court rendered its opinion upholding the order of the Interstate Commerce Commission and dismissed the complaint.

E. The questions presented are substantial and of great and recurring importance to the motor carrier industry and to the Interstate Commerce Commission in its action on the numerous applications to purchase operating rights under Section 5 (2) (a) of the Act. The Court's decision in this case is the first by any Court on the question and interpretation of the statutes involved in this appeal.

The record in this case shows that the vendee has admittedly attempted to extend its motor common carrier operations into the North Shore area of Boston, Massachusetts, where it had been denied claims of "grandfather" rights and where it had been subsequently denied permission to purchase the operating rights of another carrier operating within that territory. As a result of the decision

in this case, the vendee succeeds in extending its operations into the North Shore area and evading the normal standard of proof, not by showing that public convenience and necessity require the new service but by purchasing an outstanding Certificate of Public Convenience and Necessity which is without meaning or substance as naturally understood in the transportation industry for lack of a going-business status.

The transfer of this certificate is approved by the Commission and affirmed by the District Court on the ground that the language of Section 212 (a) of the Act more than counter-balances the inference to be drawn from the language of Section 5 (2) (a).

Other sections of the Act would seem to indicate that Congress contemplated the emphasis upon the actual carrier rather than the actual certificate. Section 215 provides that no certificate shall be issued or remain in force unless the carrier complies with the prescribed regulations for security protection of the public; Section 216 provides for safe and adequate service, just rates, through routes; Section 217 provides for filing and adherence to tariffs; Section 206(a) provides for reasonable continuous bona fide operation before and after the "grandfather" date of June 1, 1935 before the Commission was authorized to issue a Certificate of Public Convenience and Necessity. It seems clear, however, that Section 212(a) is simply a punitive measure to provide a procedure for compelling adherence to the provisions of the Act.

In *Gregg Cartage & Storage Co.* v. *United States, et al.*, (316 U. S. 74) the Supreme Court of the United States has stated, in discussing the value of operating rights which have become unused and thereafter sold, that since the purchaser of the operating rights "bought these rights in this state of voluntary suspended animation, and seeks to revive them, he cannot be heard to say that he takes the

rights free of any impairment by the voluntary suspension of operation of the then owner from whom he derives title." Yet, the Commission's rule is different once a Certificate of Public Convenience and Necessity has been issued to a motor common carrier. Its life span is determined only by Section 212(a) of the Act. The carrier retains a property right in it for personal use *or for sale* regardless of whether or not he performs any transportation service thereunder. Such an interpretation now sanctioned by the District Court is not only contrary to the common law concept of a Certificate of Public Convenience and Necessity but seems to violate the natural construction of other provisions of the Interstate Commerce Act.

While it seems that Congress intended Section 212(a) to protect a motor common carrier from an automatic nullification of his franchise for a lapse of operations, yet it does not seem that Congress intended to treat a Certificate of Public Convenience and Necessity as a speculative security, to be sold to the highest bidder, as if it were possessed of a value of its own, distinct from the values developed by the conduct of transportation operations under the certificate. If now the vendee is permitted by purchase of an outstanding unrevoked certificate to mingle the operating rights embodied therein with its own operating rights, irrespective of any going-business status of the vendor, then clearly the provisions of the Interstate Commerce Act are effectively contravened.

If the decision of the District Court is to stand, it will give rise to widespread and undesirable trafficking in Commission granted certificates, of which tens of thousands were acquired as a matter of right under the "grandfather" clause of the Act and are now outstanding in the possession of small carriers and individuals such as the vendor in this case. Upon any lapse of motor carrier operations the traffic immediately is moved by its competi-

tors. If he re-institutes his service, there is always a serious readjustment to be made in the territory. But if, after a substantial lapse, a financially strong vendee of an outstanding unrevoked certificate is allowed to enter the field simply by purchase, it is clearly instituting a new motor carrier operation under a standard different from the statutory requirements of the Act, more leniently, and contrary to the purposes and policy of the Interstate Commerce Act.

F. The following decisions sustain the jurisdiction of the Supreme Court to entertain an appeal in this case:

*United States* v. *Maher*, 307 U. S. 148;
*United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156;
*Florida* v. *United States*, 282 U. S. 194;
*B. & O. RR. Co., et al.* v. *United States*, 304 U. S. 58;
*Escanaba & Lake Superior RR. Co. v. United States*, 303 U. S. 315; and
*United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402.

G. A copy of the opinion of the District Court which includes its findings of fact and conclusions of law and a copy of the decree of said Court sought to be reviewed is appended hereto.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of the appeal.

Dated May 21, 1946.

Respectfully submitted,

JAMES JULIAN WEINSTEIN,
MICHAEL CARCHIA,
FRANCIS E. BARRETT,
*Counsel for Appellants.*

## APPENDIX

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MASSACHUSETTS

Civil Action No. 3683

GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. MOTOR TRANSPORTATION CO., and LOWELL TRUCKING CORPORATION, *Plaintiffs*,

*vs.*

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*

Before Woodbury, Circuit Judge, Sweeney and Healey, District Judges

### Opinion of the Court

March 29, 1946

WOODBURY, Circuit Judge:

This is a suit brought under Sec. 24 of the Judicial Code, (28 U. S. C. Sec. 41, (28)) to enjoin, set aside and annul an order of the Interstate Commerce Commission approving the purchase of the operating rights of Clarence L. Hardy of Boston, Mass., by Beacon Fast Freight Co. Inc., of New York, N. Y. The standing of the plaintiffs to sue under the rule of *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 19, is conceded. The jurisdiction of this court in the premises is unquestioned and unquestionable.

The facts necessary for a decision of the issues presented are not in dispute and may be found as follows:

Beacon Fast Freight Company, Inc. is a common carrier by motor vehicle of general commodities, with the usual exceptions, operating over a regular route between Cambridge, Mass., and Jersey City, N. J. under a certificate of convenience and necessity issued to it under the "grandfather" clause on October 15, 1943. It serves Boston and New York as intermediate points.

Clarence L. Hardy, on May 1, 1941, was issued a certificate, also under the "grandfather" clause, authorizing him to operate in interstate or foreign commerce as a common carrier by motor vehicle of general commodities, with the usual exceptions, over irregular routes between Boston on the one hand and all points and places in Massachusetts on the other. His principal business in former years consisted in the transportation of property in truck load lots from the docks in Boston to various interior Massachusetts points. He seldom was offered return loads to Boston and he had no interchange arrangements with other carriers. After the outbreak of the European war the movement of import traffic largely ceased and when this country entered the war ocean borne traffic from the Pacific coast also ceased. However, Hardy continued some operations until the Office of Defense Transportation issued a general order on July 13, 1942 relating, among other things, to the performance of transportation service by motor truck solely in one way loadings, and then, finding it difficult to comply with that order, he ceased all operations. This occurred on or about August 15, 1942. From that date until about December 15, Hardy leased his equipment to a private contractor, but he continued to pay rental on a terminal at Malden, Mass. until March 1943, by which time he had sold all his motor vehicles. In May 1943, he applied to the Commission for authority to suspend operations for the duration of the war, but his request was denied. As of the date of the Commission's hearing, February 7, 1944, he had cargo and liability insurance in effect, and tariffs on file with the Commission. Since June 1943 he has been employed by the United States Government.

On January 31, 1944, Beacon and Hardy entered into an agreement for the sale of the latter's operating rights to the former for $1800 payable upon approval of the transaction by the Commission.[1] Thereupon Beacon and Hardy filed a joint application with the Commission for such approval under Sec. 5 (2) (a) (i) of Part I of the Inter-

[1] Beacon's object in making this purchase is to obtain access to the area northeast of Boston known as the North Shore.

state Commerce Act, (49 U. S. C. Sec. 5, (2) (a) (i)) and in the proceedings before the Commission on that application the present plaintiffs appeared as party protestants. They confined themselves, however, to the cross-examination of witnesses and to argument. Before it their contentions, as found by the Commission were: "(1) that vendor wilfully abandoned his operations and that therefore his certificate is voidable and not the fit subject of sale under section 5; and (2) that, in any event, it would not be consistent with the public interest to authorize purchase by vendee, a regular-route operator, of irregular-route operating rights which clearly were not used by vendor in the performance of a through service in the manner proposed by the vendee."

The Commission, however, on November 1, 1944, ruling in accordance with its decision in *Quaker City Bus Co.-Purchase-Blackhawk Line, Inc.*, 38 M. C. C. 603, 606, that "Possession of a certificate, in and of itself, and without performance of any transportation, constitutes the holder thereof 'a motor carrier subject to Part II' " and finding that the proposed purchase would be consistent with the public interest and would not "materially affect the present competitive situation or injure protestants in such a way as to threaten continuance of their operations or impair their ability to perform their common carrier obligations to the shipping public," approved the purchase subject to usual conditions.

Thereupon the protestants as plaintiffs brought the instant suit in which they make three points. They say (1) that the Commission had no jurisdiction under Sec. 5 (2) (a) (i) to approve Beacon's application to purchase Hardy's certificate of public convenience and necessity for the reason that the latter had voluntarily ceased all operations under his certificate and therefore was no longer a "carrier" within the meaning of Part II of the Act; (2) that the Commission erred in approving the application for the reason that Hardy did not possess any "transferable right" to operate in interstate commerce because his operations brought him within the second proviso of Sec.

206 (a) of the Act (49 U. S. C. Sec. 306 (a));[2] and (3) that the proposed transaction of purchase and sale, if consummated, would be inconsistent with the public interest.

Only the plaintiffs' first point merits extended consideration.

Their second point was not made before the Commission but is made for the first time here. Therefore, upon the authority of *United States* v. *Hancock Truck Lines,* 324 U. S. 774, 779, 780, we rule that it is not properly before us for consideration. To be sure the plaintiffs here, when appearing as protestants before the Commission, did not expressly waive the point they now make, and in this respect the case at bar differs from the *Hancock* case. Nevertheless the reasoning of that case is applicable, and furthermore, although strictly speaking we are not an appellate court, we in reality are called upon to exercise appellate functions, and from this we think it follows that we should apply general principles applicable on review.

Their third point raises a question for determination by the Commission in the exercise of its expert administrative discretion. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 87, 88 and cases cited.

Since it does not appear that the Commission overstepped any limit expressly placed by Congress upon its discretion, and since its conclusion has ample support in the evidence—in fact the plaintiffs' argument on this point, upon analysis, is only that the Commission erroneously weighed conflicting evidence—we see nothing to warrant further consideration of this point.

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[2] "*And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter." It appears that there is such a board in Massachusetts and that Hardy had obtained an appropriate certificate from it.

The plaintiffs' argument in support of their first point runs as follows: They say that Sec. 5 (2) (a) (i) *supra* makes it lawful "for any carrier . . . to purchase, . . . the properties, or any part thereof, of another" only "with the approval and authorization of the Commission;" that Sec. 5 (13) of the Act defines the term "carrier" as used in Sec. 5 paragraphs (2) to (12), inclusive, to include "a motor carrier subject to chapter 8 of this title" (chapter 8 is Part II of the Interstate Commerce Act) and that in Part II Sec. 203 (a) (14) (49 U. S. C. Sec. 303 (a) (14)) the term "common carrier by motor vehicle" is defined to mean "any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce . . . of . . . property . . . for compensation." Then they say that to be a "carrier" within Sec. 5 (2) (a) (i), that is, one whose transactions of purchase of another carrier's property to be legal must be approved by the Commission, one must be actually conducting operations of carriage, since otherwise there is no holding out to the public to engage in transportation, and so by definition the Commission's jurisdiction fails.

This argument has logic so far as it goes, but other statutory provisions prevent its adoption.

The so-called "grandfather" clause of Sec. 206 (a) of the Motor Carrier Act (49 U. S. C. Sec. 306 (a)) requires that there shall be continuity of operation following the critical date of June 1, 1935, to entitle a carrier as a matter of right to a certificate of public convenience and necessity, (see *Gregg Cartage Co.* v. *United States*, 316 U. S. 74) but this section is not to be confused with the one under consideration here. It has no bearing on the life span of such a certificate once it has been issued. That matter is covered by Sec. 212 (a) of Part II of the Act (49 U. S. C. Sec. 312 (a)) which provides that certificates from their effective date "shall remain in effect until suspended or terminated as herein provided," and that termination, except upon application of the holder, must be by the Commission, either upon complaint or on its own initiative, after notice and hearing. This explicit provision seems to us to more

than counter-balance the inferences drawn by the plaintiffs from the definitions used in the Act, and fully to warrant the Commission's interpretation of the Act in *Quaker City Bus Co.-Purchase-Blackhawk Line, Inc.*, 38 M. C. C. 603, in which it said (p. 606): "The mere fact of an interruption in operations does not automatically revoke a certificate. To accomplish a revocation of a certificate the provisions of section 212 (a) must be satisfied." "Until that certificate is revoked in accordance with the procedure prescribed in Sec. 212 (a), it remains in full force and effect." "Possession of a certificate, in and of itself, and without performance of any transportation, constitutes the holder thereof 'a motor carrier subject to Part II.'" See also *Smith Bros. John C. Sandidge Receiver*, 33 M. C. C. 465, a proceeding for the revocation of a certificate, in which the Commission (p. 473) said "That the complete cessation of operations by respondents did not automatically and without further proceedings on our part cause a termination of their certificate . . ."

We concede that cessation of service by a carrier may, under appropriate circumstances, warrant revocation of a certificate by the Commission. And it may be that what Hardy did, or failed to do, was enough to warrant such action by the Commission. However, no complaint, so far as appears, was ever made to the Commission and it took no action on its own initiative, so that question is not before us. For present purposes it is enough that no action was ever taken by the Commission to revoke Hardy's certificate.

The provisions of Sec. 212(a) so clearly indicate that it was the intent of Congress that once a certificate of public convenience and necessity issued it should not be revoked, except possibly by actual abandonment, without action by the Commission after notice and hearing, that it would serve no useful purpose to consider the plaintiffs' arguments separately and in detail, or to labor the point further.

The plaintiffs' complaint is dismissed.

## CLERK'S CERTIFICATE

IN

GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. Motor Transportation Co., and Lowell Trucking Corporation, *Plaintiffs,*

VS.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Defendants*

I, James S. Allen, Clerk of the District Court of the United States of America for the District of Massachusetts, do hereby certify that the foregoing constitutes a part of the transcript of the record on appeal in the above entitled matter.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Court, at Boston, in said District, this second day of July, A. D. 1946.

[SEAL]

JAMES S. ALLEN,
*Clerk.*

# In the District Court of the United States for the District of Massachusetts

CIVIL NO. 3683

GENERAL TRANSPORTATION COMPANY, ET AL., PLAINTIFFS-APPELLANTS

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

**MOTION TO AFFIRM**

(Filed June 18, 1946)

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree, dated March 29, 1946,[1] of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated November 1, 1944, authorized and approved, in a proceeding under Section 5 of the Interstate Commerce Act as amended (49 U. S. C. 5), the purchase by Beacon

[1] The Court also rendered an opinion on the same date.

Fast Freight Company, Inc., of the operating rights of Clarence L. Hardy, who held a certificate issued by the Interstate Commerce Commission on May 1, 1941, in Docket No. MC–63867, authorizing transportation of general commodities by motor vehicle, with the usual exceptions, over irregular routes, between Boston on the one hand, and, on the other, all points and places in Massachusetts. Appeal was allowed on May 21, 1946, and certain appeal papers were served on May 29, 1946.[2]

Appellees submit that the appeal presents no substantial question, and that the judgment of the District Court should be affirmed. The only question raised on appeal[3] is whether the vendor Hardy is a "carrier" within the meaning of Section 5 (2) (a) (i) requiring approval by the Commission "for any carrier, * * * to purchase, * * * the properties, or any part thereof, of another."[4] Hardy held an outstand-

[2] The papers served on that date did not include the statement required by paragraph 2 of Rule 12.

[3] Other points were urged in the court below, and are discussed in the opinion of the District Court, but error is not assigned with respect to the disposition made of these questions by the court below.

[4] Section 5 (2) (a) provides:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or

ing unrevoked certificate issued by the Commission, when the agreement for transfer to Beacon Fast Freight Company, Inc., was made and was approved by the Commission. However, he had ceased all physical operations on or about August 15, 1942,[5] but no action was ever taken by the Commission, either upon its own initiative or upon complaint, under Section 212 (a) of the Act (49 U. S. C. 312 (a)), to revoke Hardy's certificate.[6]

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contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *"

It is provided in Section 5 (2) (b) that:

"If the Commission finds that, * * * the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, * * *"

Section 5 (4) provides:

"(4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, * * *"

[5] Inasmuch as his traffic had consisted of distribution from the docks in Boston to various interior Massachusetts points of shipments moving from foreign countries, principally Belgium, and from points on the Pacific Coast, Hardy found that after outbreak of the European war it was not possible for him to remain in business.

[6] Section 212 (a) provides:

"Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder

The Commission's conclusion in the case at bar that Hardy was a "carrier" by virtue of his holding an unrevoked certificate, even though no physical operations were being performed thereunder, was in accordance with its decision in *Quaker City Bus Company—Purchase—Black Hawk Line, Inc.*, 38 M. C. C. 603.[7] Appellees submit that the Commission's decision, sustained by the District Court, is clearly correct. The statutory language, legislative history, and public policy show that the

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thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder."

[7] Although appellant points to Commission decisions prior to the *Quaker City* case taking a contrary view, it is well settled that courts are not concerned with the consistency or inconsistency of decisions of the Commission with prior decisions which it has rendered. *Virginian Railway Company* v. *United States*, 272 U. S. 658, 683; *Western Papermakers Chemical Company* v. *United States*, 271 U. S. 268, 271; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775.

holder of an outstanding unrevoked certificate is to be deemed a "carrier" within the meaning of Section 5 (2) (a) of the Interstate Commerce Act as amended.

A statutory definition of the term "carrier" is furnished in Section 203 (a) (14) of the Act (49 U. S. C. 303 (a) (14)), as follows:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerie of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes.

It is clear that the holder of a certificate of public convenience and necessity issued by the Commission falls within the requirements of the above statutory definition. Possession of such a certificate is irrebuttable evidence of "holding out" to the general public as a motor carrier. The duties and obligations incident to carrier status cannot be escaped by merely failing to perform them. Mere cessation of operations does not abolish carrier status. Of course the privilege of remaining in business may be withdrawn from a carrier which is delinquent in furnishing the service covered by its certificate. Section 212 (a) of the Act (49 U. S. C. 312 (a)), however, provides a specific and exclusive method by which a certificate

may be revoked, either upon complaint or upon the Commission's own initiative, after due notice and hearing to the carrier. This is the sole mode in which a certificate may be terminated. *Smith Bros. Revocation of Certificate,* 33 M. C. C. 465, 472.

Admittedly, however, Hardy's certificate was never cancelled in accordance with the procedure prescribed in Section 212 (a). Neither the appellants nor any other motor carriers undertook to file a complaint with a view to having the cetificate cancelled, nor did the Commission take any action on its own motion. The conclusion is therefore inevitable that Hardy's certificate remained in full force and effect. To deny the holder of a certificate remaining in full force and effect the right to transfer, with Commission approval, his operating authority to a purchaser would be tantamount to a partial revocation of the certificate in a manner other than that authorized by law. There is no warrant in the statute for the distinction appellants undertake to assert, which would permit Hardy to resume operations himself but would prohibit him from transferring his operating rights to a purchaser. It is impossible to see how the *jus disponendi* could be extinguished, while the right of the original operator to resume operations remains alive.

In this connection it is important to remember that the case at bar involves only a proceeding for the transfer of an existing certificate. Apart from the revocation procedure established under

Section 212 (a) the statute imposes no requirement of continuity of operation.[4]

Accordingly, it is submitted that under the plain terms of the pertinent statutory provisions, the Commission was correct in concluding that Hardy was to be deemed a "carrier" within the meaning of Section 5, and in taking jurisdiction of the application and approving the transfer.

Moreover, the legislative history of Section 5 of the Interstate Commerce Act demonstrates that the section should be given a broad and inclusive interpretation so as to effectuate the public policy of bringing all mergers, transfers, and unifications within the supervisory jurisdiction of the Interstate Commerce Commission.

If appellants' interpretation were accepted, and the conclusion reached that a transaction of the sort involved here is not within the Commission's supervisory jurisdiction, carriers would be free to embark upon gigantic schemes of merger and consolidation, without restraint. They would not need to subject their plans to scrutiny and approval by the Commission. All that would be necessary in order to escape the Commission's

[4] In this respect the distinction is clear between the present case and one arising in connection with the issuance of a certificate under the "grandfather clause" of Section 206 (a) of the Act (49 U. S. C. 306 (a)), where continuity of substantial service is essential. *Gregg Cartage & Storage Company* v. *United States*, 316 U. S. 74, 78; *Alton Railroad Company* v. *United States*, 315 U. S. 15, 21, 25; *Shawmut Transportation Company* v. *United States*, 49 F. Supp. 831 (D. Mass., 1943).

oversight and control, insofar as the acquisition of operating rights was not essential to a proposed transaction, would be for the carriers to be acquired to cease operation prior to the consummation of the transaction. Thereupon, according to appellants' reasoning, the carrier enterprise would cease to be a carrier and it or its assets could be included in a merger or acquisition program without the necessity of obtaining the Commission's approval.[9] Obviously an interpretation of Section 5 which would leave such a loophole for evasion is contrary to the public policy embodied in Section 5. This becomes evident upon a review of the legislative history of that section.

In the original Interstate Commerce Act of 1887 Section 5 was an anti-pooling provision,[10] which may be regarded as a precursor of the broader prohibitions contained in the Sherman Antitrust Act which became law three years later.[11]

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[9] Another absurdity which would result from appellants' interpretation of Section 5 is that it would result in exemption from the requirement of Commission approval if more than 20 vehicles were involved; whereas, under the decision in *United States* v. *Resler*, 313 U. S. 57, Commission approval would be required for a transaction involving less than 20 vehicles, and hence not subject to the provisions of Section 5.

[10] Act to regulate commerce, February 4, 1887, 24 Stat. 379, 380.

[11] Sherman Act of July 2, 1890, 26 Stat. 209. In a textbook by William L. Snyder, *The Interstate Commerce Act and Federal Anti-Trust Laws*, 1904, 121–22, the author points

These restraints were relaxed by the Transportation Act of 1920.[12] Section 5 was amended so as to permit pooling upon specific approval by order of the Commission. Upon similar approval acquisitions under lease or by the purchase of stock or in any other manner not involving consolidation into a single system were made lawful. Consolidation was also permitted, subject to certain conditions requiring that the proposed consolidation be in harmony with the general plan for railroad consolidations to be prepared by the Commission.

The Emergency Transportation Act of 1933 again amended Section 5.[13] The distinction between "acquisition of control" and "consolidation into a single system" was eliminated, and a single procedure was established for dealing with the several methods of unification. A provision was added specifically prohibiting "control or management in a common interest" in whatever manner effected, except as provided in Section 5.[14]

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out that: "The Sherman Act, with reference to the Commerce Act, is practically supplemental legislation. Its effect and operation is to broaden the provisions of Section 5 so as to embrace not only carriers, but manufacturers and producers as well."

[12] 41 Stat. 456, 480.

[13] 48 Stat. 211, 217.

[14] In the *Nickel Plate case*, 79 I. C. C. 581, the Commission had held (Commissioner Eastman dissenting) that its approval was not necessary, under Section 5 as amended by the Transportation Act of 1920, for a merger not violative of the

When motor carriers were brought under regulation in 1935, Section 213 (a) of the Motor Carrier Act[15] provided a scheme of Commission control of unification patterned after Section 5.

The Transportation Act of 1940 amended Section 5, so as to make it applicable to rail, motor and water carriers.[16] At the same time the Commission's authority was broadened by the insertion of the words "or otherwise" after the provisions relating to control "through ownership of stock." (See 322 U. S. at 38–39.)

These successive changes and amendments in the language of Section 5 of the Act indicate a clear and increasing intent on the part of Congress to bring all carrier unifications within the jurisdiction and supervision of the Interstate Commerce Commission. It would be manifestly contrary to the legislative policy for an interpretation to be adopted which would exempt unification transactions from the requirement of Commission approval. A construction of Section 5 which would minimize, instead of extending, the scope of the Commission's jurisdiction would be contrary to the entire history and purpose of Section 5.

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antitrust laws, but that the consolidation might be effected under state law. *Snyder* v. *N. Y., C. & St. L. R. Co.*, 118 Ohio St. 72, 85 (1928); aff'd 278 U. S. 578.

[15] 49 Stat. 543, 555.

[16] 54 Stat. 898, 905. Section 213 (a) of the Motor Carrier Act was accordingly repealed.

Judicial construction of Section 5 leads to the same conclusion. In *United States* v. *Marshall Transport Company,* 322 U. S. 31, the Supreme Court, reversing a divided district court of three judges, adopted an interpretation of Section 5 which gave effect to its primary purpose of extending, rather than limiting, the scope of the Commission's jurisdiction. In that case a motor carrier (Refiners), which was wholly owned by a non-carrier (Union Tank Car Company), was seeking to acquire the property and business of another carrier (Marshall). This was an application "for any carrier * * * to purchase * * * the properties * * * of another" and therefore could apparently be approved by the Commission under the quoted provision of Section 5 (2) (a). But another provision of that section applies to applications "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier"; and the contention was advanced that as a result of the proposed transaction Union (the non-carrier) already controlling one carrier (Refiners) would obtain control of Marshall, and that such a result was not permissible without an application by Union for the Commission's authority to acquire such control. The Court upheld that contention.

The opinion of the Court, speaking through the late Chief Justice (see 322 U. S. at 36–37), clearly indicates that Section 5 should not be given a

"narrow" construction. The Court adopted an interpretation giving full effect to the policy of Congress that all carrier unifications should be subject to the scrutiny and supervision of the Commission.

A reading of Section 5, such as appellants advance, which would exempt carrier unifications from the requirement of obtaining Commission approval, and which would encourage evasions by the simple stratagem of causing the carriers to be acquired to cease operation, is thus clearly contrary to the public policy embodied in Section 5 as demonstrated by the legislative history of that section as well as the judicial construction placed upon it. Such an interpretation also conflicts with the plain meaning of the language used by the Congress.

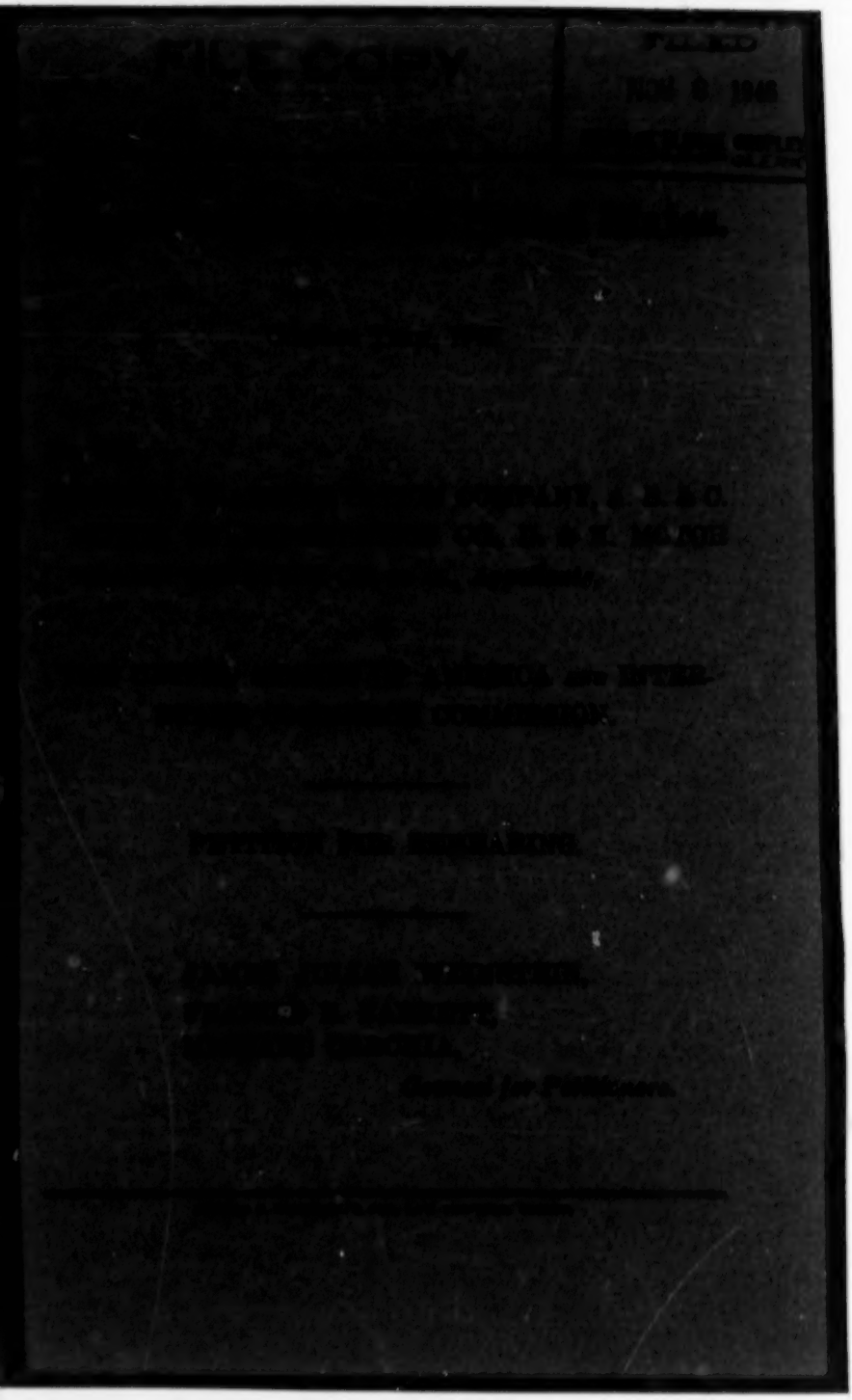
For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

J. Howard McGrath,
J. HOWARD MCGRATH,
*Solicitor General,*

Daniel W. Knowlton,
DANIEL W. KNOWLTON,
*Chief Counsel,*
*Interstate Commerce Commission.*

JUNE 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946



# Supreme Court of the United States.

OCTOBER TERM, 1946.

No. 276.

GENERAL TRANSPORTATION COMPANY, A. B. & C. MOTOR TRANSPORTATION CO., D. & N. MOTOR TRANSPORTATION CO. ET AL., *Appellants*,

*v.*

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

## PETITION FOR REHEARING.

*To the Honorable, the Justices of the Supreme Court of the United States:*

Now come your petitioners, General Transportation Company, A. B. & C. Motor Transportation Co., D. & N. Motor Transportation Co. *et al.*, appellants in the above-entitled cause, who pray for rehearing of the case and assign as reasons therefor the following:

1. The subject-matter of this appeal is the propriety of a person selling his operating rights as a common carrier by motor vehicle sixteen months after he voluntarily abandoned his transportation business. The issue turns on the construction of Section 5 (2) (a) and (b) of Part I of the

Interstate Commerce Act. The single question presented for statutory interpretation is whether this transferor was a "carrier" within the meaning of Section 5 (2) (a) (i) of the Act.

2. The decision of the District Court, which affirmed the order of the Interstate Commerce Commission approving the sale, was based upon and controlled by its interpretation of Section 212 (a) of the Act, which deals with the procedure for revocation of certificates of public convenience and necessity. The decision stands upon an anomalous doctrine recently enunciated by the Commission, namely,

> "possession of a certificate, in and of itself, and without the performance of any transportation constitutes the holder thereof a 'motor carrier' subject to Part II. It follows, therefore, that the holder is a 'common carrier by motor vehicle,' and the proposed transaction is one within the scope of section 5 (2)(a) and may be approved if found to be consistent with the public interest, notwithstanding the abandonment of motor carrier operations."

3. The decision of the District Court overlooks the fact that Section 5 (2) of Part I of the Act is the only section pertaining to the transfer of operating rights of carriers. It disregards entirely the provision of Section 5 (2) (b), which was never mentioned, which provides that—

> ". . . If the Commission finds that . . . the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction . . ."

Subparagraph (a) of Section 5 (2) provides for—

> ". . . any carrier . . . to purchase, lease, or contract to operate the properties, or any part thereof, of another; . . ."

4. In establishing this new principle of the Commission the District Court based its decision on its interpretation of the Congressional intent as expressed in Section 212 (a) regarding the revocation of certificates. No finding that was based upon substantial evidence was ever made that the "proposed transaction is within the scope of subparagraph (a)." Instead, the District Court has completely reversed the common-law concept of a carrier, a common carrier, and even a certificate of public convenience and necessity. It does violence to the basic concept of the Act to Regulate Commerce. It ignores the clear delineations of the term "carrier" which the transportation industry has inherited from the many judicial interpretations of the Interstate Commerce Act. This case is the first of its kind in any court in this country and will vitally affect the transfer of operating rights of all carriers, especially motor, water and air carriers, in the future. To allow it to stand without the testing of full debate before the Supreme Court of the United States will surely give rise to abuse and injustice never intended by the Congress.

5. The Commission and the District Court were greatly concerned with the *jus disponendi* of the transferor so long as he was the holder of an outstanding unrevoked certificate of public convenience and necessity; that the denial of the right to transfer would effect a "partial revocation" of such certificate without complying with the provisions of Section 212 (a) of Part II of the Act.

6. There is nothing within the plain language of Section 5 (2) of Part I of the Act which is inconsistent with other sections of the Act, even Section 212 (a) of Part II. The denial of the right to transfer a certificate, when the holder has gone out of business, sold his equipment, closed his terminal and discharged his employees, still leaves the holder of an outstanding unrevoked certificate of public convenience and necessity exactly where he was before he attempted to sell it. The denial of approval does not revoke it or "partially" revoke it. He still has the right, if he so chooses, to start up again his transportation business. That was all that Section 212 (a) of Part II was ever intended to give him. All decisions of the Commission on similar facts, prior to the enunciation of this so-called Blackhawk doctrine, denied such an applicant its approval of the transfer of his certificate of public convenience and necessity on the ground that possession of operating authority alone was not sufficient to constitute a person a motor carrier within the meaning of Section 5; that it was always incumbent upon applicants under Section 5 to establish the jurisdictional facts, including carrier status of the person whose properties were sought to be purchased or otherwise acquired. It is well established that the Commission must make those basic and essential findings necessary to give its order of approval of a sale the requisite statutory validity. Therefore it must make a finding that the vendor of a certificate is a *carrier* within the meaning of Section 5 of Part I of the Act which can be supported by substantial evidence.

7. The term "carrier" as used in the Interstate Commerce Act has a long history of judicial interpretation. *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175. *Chicago, New York & Boston Refrigerator Co.* v. *Interstate Commerce*

*Commission*, 265 U.S. 292. *United States* v. *American Railway Express Co.*, 265 U.S. 425. *Taylor* v. *N.Y. Central R.R.*, 62 N.E. (2) 777 (C.C.A. 2d 1945). Every provision of the Act applies to a "going-concern" carrier. The natural meaning of the word "carrier" is one who operates as a carrier by railroad or any other conveyance. The first thing that is looked at in determining the status of a carrier is the physical aspect of the company. It is fundamental that "carrier" status requires not only a holding out with ability and willingness to transport but also some actual transportation consistent therewith. Yet without judicious reasoning or legal precedents the Commission transcended these well-settled propositions and decided the case wholly upon a new theory of importance of the term "certificate of public convenience and necessity."

8. The grant of a certificate of public convenience and necessity has always been only the grant of a privilege to serve the public. It is transferable only by gift of the statute. Being a public grant, the *quid pro quo* is service to the public. It is *not* property in any legal or constitutional sense. It is an obligatory franchise; he must hold himself out to serve the public; he must keep his machinery in repair. Yet the decision of the District Court holds that, since the holder of a certificate cannot be deprived of the ownership of his property without a hearing according to Section 212 (a) of Part II of the Act, then it must follow that he cannot be prevented from selling his certificate, even though he has long since abandoned the basis for its existence. But there is no guaranty of a *jus disponendi* in the Interstate Commerce Act. Any disposition must have the approval of the Commission. Such approval is confined for statutory authority only to Sections 5 (2) (a) (i) and 5 (2) (b). The word "certificate" does not appear any-

where in this part of the Act and the only issue in applications under Section 5 is the transfer of "properties" of a "carrier" in the public interest. It is respectfully submitted that this phase of the case was overlooked by the District Court.

9. The public policy is against the principle now established by the instant case. It encourages the trafficking in certificates without benefit to the public. It enables an existing common carrier to extend its operations, as was done here, by the simple device of purchasing an outstanding unrevoked certificate without proving that the public convenience and necessity require the extended service. It is a serious threat to the economic condition and stability of the other common carriers in the field. It fosters a circumvention of the statutory standards of public convenience and necessity never contemplated by the Act. The "grandfather" clause of the Motor Carrier Act of 1935 was incorporated to prevent a mad scramble for operating rights and to issue certificates only on proof of actual bona-fide operations on June 1, 1935. All other certificates could be issued only on proof that the public convenience and necessity required the proposed new operations. Legal precedents and statutory language have continuously emphasized the going-concern status of carriers transferring their operating rights. Nowhere has judicial interpretation sanctioned such a transferable asset theory of a certificate of public convenience and necessity as implied in the decision of the District Court. The effect of this doctrine will place the value of a certificate not in keeping with its natural worth as representative of a transportation business but on the arbitrary worth to a competitor seeking to use the empty certificate for his personal aggrandizement. Such a principle has no place in a transportation system

notoriously beset with economic ills. It was born of erroneous respect for the importance of Section 212 (a) of Part II of the Act, which has little, if anything, to do with the provisions of Section 5 (2) (a) and (b) of Part I of the Act.

Wherefore your petitioners respectfully pray for rehearing of this cause in order that a full review of the case be had other than the single review of the District Court.

GENERAL TRANSPORTATION COMPANY,
A. B. & C. MOTOR TRANSPORTATION CO.,
D. & N. MOTOR TRANSPORTATION CO.,
LOWELL TRUCKING CORPORATION,
By JAMES JULIAN WEINSTEIN,
FRANCIS E. BARRETT,
MICHAEL CARCHIA,
*Counsel for Petitioners.*

**Certificate of Counsel.**

I, Michael Carchia, counsel for petitioners in the above-entitled cause, do hereby certify that this petition for rehearing by the Supreme Court of the United States is presented in good faith and not for delay.

MICHAEL CARCHIA,
*Counsel for Petitioners.*

No. 276. GENERAL TRANSPORTATION CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the District of Massachusetts. October 14, 1946. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. §§ 5 (2) (a), 203 (a) (14), 212 (a), Interstate Commerce Act, as amended, 49 U. S. C. §§ 5, 303 (a) (14), 312 (a). *Michael Carchia* for appellants. *Solicitor General McGrath* and *Daniel W. Knowlton* for the United States and the Interstate Commerce Commission, appellees. Reported below: 65 F. Supp. 981.